

1 THE HONORABLE JOHN C. COUGHENOUR
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 LORENZO BELL,

11 v. Petitioner,

12 UNITED STATES OF AMERICA,

13 Respondent.

14 CASE NO. C19-2018-JCC

ORDER

15 This matter comes before the Court on Petitioner Lorenzo Bell's motion to vacate, set
16 aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Dkt. No. 1). Having thoroughly
17 considered the parties' briefing and the relevant record, the Court finds oral argument
18 unnecessary and hereby DENIES the motion and DISMISSES Petitioner's habeas petition for the
19 reasons explained herein.

20 **I. BACKGROUND**

21 In 2018, Petitioner was observed regularly engaging in activity consistent with
22 distributing drugs at 3rd Avenue and Yesler Way in Seattle, an area frequented by vulnerable and
23 homeless people. (*See* Dkt. No. 71-1 at 20.) On August 3, 2018, pursuant to a warrant, Petitioner
24 was searched, arrested, and found to be in possession of cocaine. (*Id.*) Police recovered a pistol
25 from his apartment. (*Id.*) During plea negotiations, the Government agreed to dismiss an initial
26 charge of felon in possession of a firearm. (*See id.* at 5–7, 17–18.) Petitioner pleaded guilty to

1 possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and
 2 § 841(b)(1)(C). (*Id.* at 17–18.) Petitioner waived his right to appeal or collaterally attack his
 3 conviction, except as to a claim of ineffective assistance of counsel. (*Id.* at 23–24.)

4 Petitioner entered his plea before the Honorable Mary A. Theiler. (*Id.* at 25–26.) Under
 5 oath, Petitioner agreed that he was fully satisfied with his attorney’s performance and had
 6 sufficient time to discuss his case and review the plea agreement. (*Id.* at 29.) Petitioner also
 7 affirmed that he understood the rights he had waived by pleading guilty, including his right to
 8 appeal, although he stated that he had “reluctantly” agreed to waive those rights and plead guilty.
 9 (*Id.* at 32.) The Government agreed to recommend no more than 48 months of imprisonment. (*Id.*
 10 at 22, 38.) Petitioner agreed to the statement of facts as summarized in his plea agreement. (*Id.* at
 11 38–39.) When Judge Theiler asked if there was anything with which he disagreed, Petitioner
 12 said, “I understand it very well. It wouldn’t do any good to disagree anyway.” (*Id.*) Judge Theiler
 13 asked, “[B]ut I want to make sure that there isn’t something I should know about that you
 14 disagree with. Is it good to go?” (*Id.*) Petitioner answered, “Yes.” (*Id.*)

15 On June 4, 2019, the Court sentenced Petitioner to 36 months of imprisonment, followed
 16 by 36 months of supervised release. (*Id.* at 9.) At the time of sentencing, Petitioner was 73 years
 17 old. (*Id.* at 49.) The Court stated that but for Petitioner’s service in Vietnam it would have
 18 imposed a much longer sentence. (*Id.* at 54.) The Court also considered Petitioner’s numerous
 19 uncounted drug convictions, some going back 30 years, the fact there was a weapon in his home,
 20 and his age and poor physical condition. (*Id.*)

21 On June 10, 2019, while still represented by trial counsel, Petitioner moved *pro se* for a
 22 lighter sentence and for return of his forfeited Rolex watch and BMW automobile. *United States*
 23 *of America v. Lorenzo Bell*, Case No. CR18-0261-JCC, Dkt. No. 41–43 (W.D. Wash.). On June
 24 13, 2019, he filed a notice of appeal. (Dkt. No. 71-1 at 4.) On appeal, Petitioner’s newly
 25 appointed appellate counsel filed an *Anders* brief stating that there were no grounds for relief and
 26 moved to withdraw as counsel. *Bell*, Case No. CR18-0261-JCC, Dkt. No. 55. The Ninth Circuit

1 concluded that Petitioner had waived his right to appeal and there was no arguable issue as to the
 2 validity of the waiver. *Id.* The Ninth Circuit dismissed Petitioner’s appeal on February 7, 2020.
 3 *Id.*

4 On December 9, 2019, Petitioner filed the instant § 2255 habeas petition, asserting four
 5 grounds for relief based on ineffective assistance of counsel. (Dkt. No. 1.) First, Petitioner
 6 alleges that his appellate counsel rendered ineffective assistance by failing to move for a
 7 modification of Petitioner’s sentence under Section 404 of the 2018 First Step Act and Section 2
 8 of the Fair Sentencing Act. (*Id.* at 4.) Second, Petitioner alleges that his appellate counsel
 9 rendered ineffective assistance by failing to challenge “the vague possession and crime of
 10 violence definitions under movant’s U.S. Sentencing Guidelines” in violation of the First,
 11 Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Id.* at 5.) Third, Petitioner alleges that
 12 his appellate counsel rendered ineffective assistance by failing to raise claims under Section 404
 13 of the First Step Act and Section 2 of the Fair Sentencing Act. (*Id.* at 7.) Fourth, Petitioner
 14 alleges that his trial and appellate counsel rendered ineffective assistance by failing to move for
 15 compassionate release under the First Step Act. (*Id.* at 8.)

16 **II. DISCUSSION**

17 **A. Legal Standard**

18 A prisoner in federal custody who believes their sentence violates the Constitution or
 19 federal law may petition the sentencing court to vacate the conviction or set aside the sentence.
 20 28 U.S.C. § 2255(a). A “collateral attack on a criminal conviction must overcome the threshold
 21 hurdle that the challenged judgment carries with it a presumption of regularity, and that the
 22 burden of proof is on the party seeking relief.” *Williams v. United States*, 481 F.2d 339, 346 (2d
 23 Cir. 1973). In reviewing such a petition, a court may rely upon the original proceeding’s record
 24 and evidence filed by the parties. *Shah v. United States*, 878 F.2d 1156, 1160 (9th Cir. 1989). It
 25 may also employ its own recollection, experience, and common sense. *Id.*

26 If the written record does not foreclose the petitioner’s claims, the Court must order an

1 evidentiary hearing, and make findings of fact and conclusions of law. 28 U.S.C. § 2255(b).
 2 However, a § 2255 motion “can be dismissed without a hearing if . . . the petitioner’s allegations
 3 cannot be accepted as true because they are contradicted by the record, inherently incredible, or
 4 conclusions rather than statements of fact. To avoid dismissal, “the movant must present some
 5 credible, non-conclusory evidence” in support of his claims. *Sanders v. United States*, 341 F.3d
 6 720, 722 (8th Cir. 2003); *see United States v. Jackson*, 209 F.3d 1103, 1106 (9th Cir. 2000) (no
 7 relief is warranted when the prisoner’s claims are contrary to the record or incredible when
 8 weighed against it).

9 The Sixth Amendment guarantees a criminal defendant the right to effective assistance of
 10 counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts evaluate claims of
 11 ineffective assistance of counsel under a two-prong test. *Id.* Under that test, a defendant must
 12 prove that (1) counsel’s performance fell below an objective standard of reasonableness and (2) a
 13 reasonable probability exists that, but for counsel’s error, the result of the proceedings would
 14 have been different. *Id.* at 687–94. When considering the first prong of the *Strickland* test, there
 15 is a strong presumption that counsel’s performance fell within the wide range of reasonably
 16 effective assistance. *Id.* “Mere criticism of a tactic or strategy is not in itself sufficient to support a
 17 charge of inadequate representation.” *Gustave v. United States*, 627 F.2d 901, 903–04 (9th Cir.
 18 1980).

19 The second prong of the *Strickland* test requires a showing of actual prejudice. Thus, a
 20 defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional
 21 errors, the result of the proceeding would have been different. A reasonable probability is a
 22 probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.
 23 When challenging the effectiveness of appellate counsel, a defendant must demonstrate that
 24 “counsel acted unreasonably in failing to discover and brief a merit-worthy issue.” *Tamplin v.*
 25 *Muniz*, 894 F.3d 1076, 1090 (9th Cir. 2018) (quoting *Moormann v. Ryan*, 628 F.3d 1102, 1106
 26 (9th Cir. 2010)).

1 **B. Ineffective Assistance of Counsel**2 1. Claims Under the First Step and Fair Sentencing Acts

3 The Fair Sentencing Act of 2010 altered the statutory penalties for some offenses
 4 involving cocaine base (crack cocaine), increasing the amount of cocaine base necessary for
 5 application of a mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A), (b)(1)(B). In 2018,
 6 Section 404 of the First Step Act made certain provisions of the Fair Sentencing Act retroactive.
 7 Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018).

8 As his first and third grounds for relief, Petitioner alleges that his appellate counsel
 9 rendered ineffective assistance by failing to move for a modification of his sentence under
 10 Section 404 of the 2018 First Step Act and Section 2 of the Fair Sentencing Act. (Dkt. No. 1 at
 11 4.) Petitioner states that he wrote to his appellate counsel to inquire about potential relief under
 12 both the First Step and Fair Sentencing Acts.¹ (*Id.* at 4, 15.) But because Petitioner was
 13 sentenced on June 4, 2019, he received the benefit of the new mandatory minimum provisions of
 14 Section 2 of the Fair Sentencing Act. Furthermore, the record makes clear that the Court was not
 15 required to and did not impose a mandatory minimum sentence. (*See* Dkt. No. 7-1 at 53–55.)
 16 Thus, Petitioner has not proven that his appellate counsel’s performance fell below an objective
 17 standard of reasonableness. *See Strickland*, 466 U.S. at 687. Therefore, Petitioner’s motion is
 18 DENIED as to these grounds.

19 //

20 ¹ Petitioner also states he believes that he is being wrongfully denied good time credit
 21 under Section 102(b)(2) of the First Step Act and that absent counsel’s ineffective representation,
 22 he would have raised these issues and elected to proceed to trial. (Dkt. No. 1 at 16.) But whether
 23 Petitioner is currently receiving good time credit was not and could not have been an issue at
 24 trial or on appeal. Thus, it cannot serve as a basis to challenge the sentence this Court imposed
 25 on June 4, 2019.

26 Petitioner also asserts in his affidavit, but not in his petition, that he advised appellate
 27 counsel of his belief that he was unfairly targeted for prosecution on the basis of his race and
 28 geographical location. (*Id.*) But he offers no facts to support this assertion. And an appellate
 29 attorney is not constitutionally obligated to raise every non-frivolous issue requested by a
 30 defendant. *Jones v. Barnes*, 463 U.S. 745, 753 (1983).

1 2. Definitions of Possession, Force, and Crime of Violence

2 As his second ground for relief, Petitioner argues that his appellate counsel was
 3 ineffective for failing to challenge his sentence on appeal based on the definitions of
 4 “possession” and “crime of violence.” (Dkt. No. 1 at 5–6.) But neither of these definitions were
 5 at issue in Petitioner’s case. The definition of “possession” was relevant to Petitioner’s plea and
 6 sentence, but it was not unconstitutionally vague as applied because Petitioner pleaded guilty to
 7 possessing cocaine in his pants pocket. (See Dkt. No. 7-1 at 20); *United States v. Purdy*, 264 F.3d
 8 809, 811 (9th Cir. 2001). And Petitioner did not plead guilty to and was not sentenced for a
 9 firearm offense or other offense involving the definition of “force” or “crime of violence.” (Dkt.
 10 No. 7-1 at 17–18.) Because this issue was frivolous, appellate counsel was not ineffective for
 11 failing to raise it. *See Tamplin*, 894 F.3d at 1090. Furthermore, Petitioner waived this right to
 12 challenge the length of his sentence or conditions of supervised release on direct appeal. (Dkt.
 13 No. 7-1 at 23–24.) Therefore, Petitioner’s motion is DENIED as to this ground.

14 3. Compassionate Release

15 18 U.S.C. § 3582(c)(1)(A) allows a court to reduce a previously-imposed term of
 16 imprisonment if satisfies certain conditions set forth in the statute. As Petitioner’s fourth ground
 17 for relief, he argues that trial and appellate counsel were ineffective for failing to argue for relief
 18 under the compassionate release statute.² But § 3582(c)(1)(A) does not apply to sentencing.
 19 Thus, Petitioner has not proven that trial or appellate counsel’s performance fell below an
 20 objective standard of reasonableness when they failed to move for compassionate release. *See*
 21 *Strickland*, 466 U.S. at 687. Therefore, Petitioner’s motion is denied as to these grounds.

22 In sum, the record conclusively shows Petitioner is not entitled to relief on his habeas

23 ² In his fourth ground for relief, Petitioner also argues that his trial and appellate counsel
 24 failed to raise other viable, non-frivolous claims, but he fails to specifically identify which
 25 claims. (Dkt. No. 1 at 8–9, 16–17.) Furthermore, Petitioner’s only argument as to how he was
 26 prejudiced incorrectly assumes that he was permitted to move for compassionate release prior to
 sentencing or on appeal. (*See id.*) Thus, Petitioner fails to meet both prongs of the *Strickland* test.
See 466 U.S. at 687–94.

1 claims. *See* 28 U.S.C. § 2255(b). Therefore, the Court DENIES Petitioner's request for an
2 evidentiary hearing and DENIES his motion to vacate, set aside, or correct his sentence pursuant
3 to 28 U.S.C. § 2255.

4 **C. Certificate of Appealability**

5 When issuing a final order denying relief under 28 U.S.C. § 2255, the Court must
6 determine if a certificate of appealability should issue. 28 U.S.C. § 2253. To grant a certificate of
7 appealability, the petitioner must make "a substantial showing of the denial of a constitutional
8 right." *Id.* § 2253(c)(2). The Supreme Court has clarified that a petitioner makes such a showing
9 when "reasonable jurists could debate whether . . . the petition should have been resolved in a
10 different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

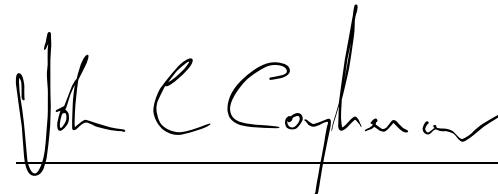
11 Petitioner has not made that showing. As discussed above, his first, third, and fourth
12 grounds for relief plainly misread the relevant statutes. His second ground for relief based on to
13 the definitions of possession and crime of violence is plainly contradicted by the record. On this
14 record, no reasonable jurist could find that Petitioner's conclusory and unsupported allegations
15 would entitle him to relief. Therefore, the Court DENIES a certificate of appealability.

16 **III. CONCLUSION**

17 For the foregoing reasons, Petitioner's § 2255 motion to vacate, set aside, or correct his
18 sentence (Dkt. No. 1) is DENIED and this action is DISMISSED. Issuance of a certificate of
19 appealability is DENIED.

20 DATED this 30th day of June 2020.

21
22
23
24
25
26



John C. Coughenour
UNITED STATES DISTRICT JUDGE